

conditions or limitations on, the resale of such telecommunications services."⁶⁰ Moreover, the Commission has determined that in order to demonstrate "competitive checklist" compliance, a BOC must "demonstrate[] that its recurring and non-recurring rates for resold services are set at the retail rates less the portion attributable to reasonably avoidable costs [associated with the wholesale provision of service]."⁶¹ BellSouth has not made the requisite showing with respect to the availability of telecommunications services for resale.

The Commission has made clear that "resale restrictions are presumptively unreasonable."⁶² As explained by the Commission, "the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position."⁶³ Although "unable to predict every potential restriction or limitation an incumbent LEC may seek to impose on a reseller," the Commission identified several resale restrictions which it would not tolerate. Included among "restrictions [that] should be considered presumptively unreasonable" were restrictions on the resale of "contract and other customer-specific offerings."⁶⁴ "A contrary result," the Commission remarked, "would permit

⁶⁰ 47 U.S.C. § 251 (c)(4).

⁶¹ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 295.

⁶² Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 939.

⁶³ Id.

⁶⁴ Id. at ¶¶ 948, 953.

incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."⁶⁵

In blatant disregard of this holding, BellSouth's SGATC excludes from those services made available for resale at wholesale rates "contract service arrangements."⁶⁶ As acknowledged by BellSouth, contract service arrangements are made available "at the same rates, terms, and conditions offered to BellSouth's end user customers."⁶⁷ As set forth in BellSouth's SGATC:

B. Discounts. Retail services are available at discounts as ordered by the Commission . . . Discounts apply to intrastate tariffed service prices except that discounts do not apply to the following services:

1. Contract Service Arrangements. BellSouth's contract service arrangements are available for resale only at the same rates, terms and conditions offered to BellSouth end users.⁶⁸

Compounding this glaring deficiency, BellSouth will not permit competitive LECs to aggregate the usage of multiple end users to satisfy the volume requirements of individual contract service arrangements; indeed, BellSouth will not permit competitive LECs to market a contract service arrangement to any end user other than the customer to which it was originally provided. The Commission has of course ruled otherwise:

With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-

⁶⁵ Id. at ¶ 948.

⁶⁶ BellSouth Brief at 53 .

⁶⁷ Id.

⁶⁸ BellSouth SGATC at § XIV.B.

volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimum level of demand.⁶⁹

BellSouth has also failed to "demonstrate[] that its recurring and non-recurring rates for resold services are set at the retail rates less the portion attributable to reasonably avoidable costs [associated with the wholesale provision of service]."⁷⁰ The Commission has made clear that such a demonstration must include "the basis for the prices submitted by the BOC in the application," and in particular should reflect the results of "completed cost studies."⁷¹ These requirements are all the more important in instances in which the BOC's rates fall outside the default range of discounts computed by the Commission -- *i.e.*, 17 to 25 percent.⁷²

BellSouth's wholesale discount in the State of South Carolina is 14.8 percent -- nearly 15 percent lower than the low end of the Commission's default range of discounts.⁷³ It was derived from an arbitration proceeding rather than a SCPSC-conducted cost study.⁷⁴ It reflects the result of a BellSouth-conducted "avoidable cost discount study" adjusted upward by the SCPSC by a mere 1.6 percentage points. It is already outdated, having been predicated on 1995 data. And it is documented in BellSouth's Application by a single summary paragraph, accompanied by a single

⁶⁹ Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 953.

⁷⁰ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 295.

⁷¹ Id. at ¶ 294.

⁷² Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 933.

⁷³ BellSouth Brief at 53.

⁷⁴ Id.

summary data sheet.⁷⁵ In other words, BellSouth wholesale discount is inherently suspect and BellSouth has not provided the data and documentation necessary for the Commission to assess whether it accurately reflects reasonably avoidable costs.⁷⁶ Moreover, there is no basis on which to conclude that the discount will not be further reduced in a SCPSC-conducted cost study.

2. BellSouth Has Not Provided Access To Network Elements On An Unbundled Basis In Accordance With Sections 251(c)(3) And 252(d)(1)

a. BellSouth's Rates For Unbundled Network Elements Have Not Been Shown To Reflect Forward-Looking Economic Costs

The Commission has correctly recognized that "[i]n ascertaining whether a BOC has complied with the competitive checklist regarding pricing for . . . unbundled network elements . . . pursuant to Section 251, it is critical that prices for these inputs be set at levels that encourage efficient market entry."⁷⁷ The Commission has further correctly concluded that forward-looking economic costs "best replicate[], to the extent possible, the conditions of a competitive market, . . . reduce[] the ability of an incumbent to engage in anticompetitive behavior, permit[] new entrants to take advantage of the incumbent's economies of scale, scope and density, and [therefore], encourage[] efficient market entry and investment by new entrants."⁷⁸ For "competitive checklist"

⁷⁵ BellSouth Application at Appendix A, Tab 2 (Cochran Affidavit) at ¶ 31, Exh. A.

⁷⁶ Notably, the 14.8 percent discount is the lowest in the BellSouth region. Wholesale discount in the other BellSouth "in-region States" range from 15.54 percent (business, Kentucky) to 21.83 percent (residential, Florida). Residential wholesale discounts in four of the remaining eight BellSouth "in-region States" exceed 20 percent. See Exhibit 1, attached hereto.

⁷⁷ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 289.

⁷⁸ Id. at ¶ 289.

compliance purposes, forward-looking economic costs must be implemented through total element long-run incremental costs ("TELRIC") and "prices for . . . unbundled network elements must be based on TELRIC principles."⁷⁹

The Commission directed BOCs to "include in . . . [their] application[s] detailed information concerning how unbundled network element prices were derived."⁸⁰ Moreover, the Commission noted the importance of "the basis for the prices submitted by the BOC in the application," distinguishing between "prices . . . based on completed cost studies . . . [and] interim prices adopted pending the completion of such studies."⁸¹

BellSouth asserts that its "rates for network elements purchased on an unbundled basis . . . have been approved by the SCPSC . . . [as] 'cost based within the requirements of the 1996 Act.'"⁸² But these rates are interim in nature, apparently reflecting the results of an arbitration involving BellSouth and AT&T, as well as other sources.⁸³ The proceeding which will generate permanent values based on "completed cost studies" will not even commence until December 1, 1997.⁸⁴ In other words, the rates set by BellSouth for unbundled network elements have never been found to reflect forward-looking economic costs as determined using the TELRIC pricing

⁷⁹ Id. at ¶ 290.

⁸⁰ Id. at ¶ 291.

⁸¹ Id. at ¶ 294.

⁸² BellSouth Brief at 40.

⁸³ Id. at 35-36.

⁸⁴ Id. at 36-37.

methodology. And BellSouth has not provided in its Application sufficient data and documentation for the Commission to make such a determination.

BellSouth attempts to remedy this glaring deficiency by stressing that the SCPSC has required "it to guarantee CLECs a retroactive downward adjustment to their bills if warranted after cost proceedings," while at the same time requiring it to forgo recovery of "any undercharges incorporated into the interim . . . rates."⁸⁵ The multiple problems with this argument are manifest. First, there is no guarantee that the SCPSC's cost proceedings will generate rates based on forward-looking economic costs or that in the event that such rates are computed, "downward adjustments" will ever be deemed to be "warranted." Second, it is highly questionable whether any order mandating such "downward adjustments" would be enforceable, appearing in all respects to constitute impermissible retroactive ratemaking. Finally, the argument merely confirms the uncertain nature of the interim rates, and the potential need for a "downward adjustment" confirms that the rates may now be acting as a competitive barrier.

**b. BellSouth Has Failed To Demonstrate That It Provides
Nondiscriminatory Access To All OSS Functions**

The Commission has repeatedly emphasized the critical importance of operations support systems ("OSS") to the ability of new market entrants to compete with incumbent LECs using unbundled network elements or resold services:

[T]he massive operations support systems employed by incumbent LECs, and the information such systems maintain and update to administer telecommunications networks and services, represent a significant barrier to entry. It is these systems that determine, in large part, the speed and efficiency with which incumbent LECs can

⁸⁵ Id. at 36.

market, order provision and maintain telecommunications services and facilities. Thus, we agree with Ameritech that "[o]perational interfaces are essential to promote viable competitive entry."⁸⁶

The Commission has been no less adamant with respect to the obligation of incumbent LECs to provide nondiscriminatory access to OSS functionalities:

We conclude that an incumbent LEC must provide nondiscriminatory access to [its] operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself. Such nondiscriminatory access necessarily includes access to the functionality of any internal gateway systems the incumbent LEC employs in performing the above functions for its own customers. . . . Obviously, an incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile-based ordering.⁸⁷

Critically, the Commission also determined that "nondiscriminatory access to OSS functions was a 'term or condition' of unbundling other network elements under section 251(c)(3), or resale under section 251(c)(4):"

In order for a BOC to be able to demonstrate that it is providing the items enumerated in the checklist (*e.g.*, unbundled loops, unbundled local switching, resale services), it must demonstrate, *inter alia*, that it is providing nondiscriminatory access to the systems, information, and personnel that support those elements or services. Therefore, an examination of a BOC's OSS performance is integral to our determination whether a BOC is 'providing' all of the items contained in the competitive checklist. Without equivalent access to the BOC's operations support systems, many items required by the checklist,

⁸⁶ Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 516.

⁸⁷ Id. at ¶ 523.

such as resale services, unbundled loops, unbundled local switching, and unbundled local transport, would not be practically available.⁸⁸

In determining whether a BOC has met its OSS obligation under Section 271, the Commission will look first to "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."⁸⁹ Next, the Commission "must determine whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter."⁹⁰ Under this second inquiry, the Commission must determine whether the OSS functions "are actually handling current demand and will be able to handle reasonably foreseeable demand volumes."⁹¹ And the Commission has recognized that "the most probative evidence that OSS functions are operationally ready is actual commercial usage."⁹²

BellSouth touts the "tested" capacity of its "combined electronic interfaces" as "5,000 total requests per day," with "sufficient excess capacity to handle double that volume."⁹³ These figures, however, are for a nine state region, encompass all competitive LECs and represent both pre-ordering and ordering requests. The per-state and per-carrier values are dramatically smaller;

⁸⁸ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 132.

⁸⁹ Id. at ¶ 136.

⁹⁰ Id.

⁹¹ Id. at ¶ 138.

⁹² Id.

⁹³ BellSouth Brief at 23.

indeed, assuming an even distribution of capacity across states and across carriers,⁹⁴ the per-day values drop into the single digits. And these single-digit values represent both the pre-ordering inquiries that are necessary to prepare the service orders, as well as the service orders themselves. Or, in other words, these single-digit values represent precious few customers.

Moreover, it is TRA's understanding that the two available BellSouth electronic interfaces for ordering and provisioning non-complex services, including residence and business lines and customer calling services -- *i.e.*, Local Exchange Navigation System ("LENS") and Electronic Data Interchange ("EDI") -- route orders through a local exchange ordering database and then through either a Local Exchange Service Order Generator ("LESOG") or the Local Carrier Service Center ("LCSC"). The capacity of the LESOG is apparently half of the BellSouth-predicted capacity of the "combined electronic interfaces," creating a bottleneck apart from the initial OSS interface.

Second, in arguing for the operational readiness of its OSS interfaces, BellSouth relies principally on "extensive internal testing."⁹⁵ As the Commission has recognized, "internal testing . . . [is] a far less reliable indicator[] of actual performance than commercial usage."⁹⁶ While

⁹⁴ The National Association of State Regulatory Commissioners ("NARUC") reports that there are over 250 competitive LECs in the BellSouth nine-state region, including 16 in Alabama, 96 in Florida, 40 in Georgia, 14 in Kentucky, 21 in Louisiana, 14 in Mississippi, 23 in North Carolina, 10 in South Carolina, and 22 in Tennessee. NARUC, Telecommunications Competition 1997, Sec. I, Table 1 (1997). BellSouth notes that the SCPSC "has approved BellSouth's agreements with . . . 67 telecommunications carriers." BellSouth Brief at 5, fn. 4.

⁹⁵ Id.

⁹⁶ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 138.

BellSouth claims that it "received more than 10,000 electronic orders for resale services in August alone," and has processed "1,700 trouble reports . . . through the maintenance and repair interface,"⁹⁷ not only do these values represent a fraction of what will occur in the event local competition takes hold, they fail to reflect activities with respect to other OSS functions or other uses of OSS functions, such as ordering unbundled network elements or network interconnection. With respect to these other OSS functions and uses, BellSouth lacks not only adequate commercial experience, but, given the "internal" nature of the testing, sufficient input and experience with prospective users -- *i.e.*, competitive LECs.

The capacity and operational constraints which undermine BellSouth's OSS interfaces were succinctly summarized by a witness appearing on behalf of AT&T in SCPSC Docket No. 97-101-C:

To review, the interfaces that BellSouth proposes are not electronic and require additional human intervention. They restrict what information in BellSouth's databases can be obtained and how a new entrant can do business. They have not been adequately documented and cannot be effectively used by new entrants. They have unknown capacity and response time constraints and are not operationally stable today. They would require throw away development and processes where they do not reflect existing and merging standards. Collectively these proposed interfaces discriminate against new entrants by increasing customer contact times, increasing error rates, raising the number of late installations, lengthening repair intervals, and raising a new entrant's cost of doing business. The resulting differences in customer service will be perceivable by a new entrant's customers and will undermine that individual new entrant's plan as well as the development of competitive choice for local service in South Carolina.⁹⁸

⁹⁷ BellSouth Brief at 23.

⁹⁸ Testimony of Jay Bradbury, Bell South Application, Appx. C, Vol. 7.

c. BellSouth Has Not Proposed To Provide Unbundled Local Switching In A Manner Consistent With Statutory Mandates

BellSouth has signaled its intention to establish "rates for activation and use of vertical features" separate from those it assesses for access to unbundled local switching.⁹⁹ The Commission has defined the local switching element "to encompass line-side and trunk-side facilities plus the features, functions and capabilities of the switch."¹⁰⁰ "The 'features, functions, and capabilities' of the local switch," the Commission correctly recognized, include "all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex, as well as any technically feasible customized routing functions."¹⁰¹ "Thus," the Commission explained, "when a requesting carrier purchases the unbundled local switching element, it obtains *all switching features in a single element on a per-line basis*."¹⁰²

The Commission expressly rejected arguments that the local switching element should be "further unbundl[ed] . . . into a basic switching element and independent vertical feature elements."¹⁰³ Moreover, the Commission rejected claims that vertical switching features should be treated as retail services.¹⁰⁴

BellSouth would essentially achieve both rejected ends by establishing separate rates for vertical features included within the local switching element.

⁹⁹ BellSouth Brief at 44.

¹⁰⁰ Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 412.

¹⁰¹ Id.

¹⁰² Id. (emphasis added).

¹⁰³ Id. at ¶ 414.

¹⁰⁴ Id. at ¶ 413.

**d. Deficiencies In BellSouth's OSS Functionalities Render
Access To Unbundled Network Elements Inadequate**

As noted previously, the Commission, noting that "[w]ithout equivalent access to the BOC's operations support systems, many items required by the competitive checklist, such as . . . unbundled loops, unbundled local switching, and unbundled local transport, would not be practically available," has recognized that an examination of a BOC's OSS performance is "integral to [its] determination whether a BOC is 'providing' all of the items contained in the competitive checklist."¹⁰⁵ Thus, the Commission has mandated that a BOC "must demonstrate, *inter alia*, that it is providing nondiscriminatory access to the systems, information, and personnel that support those elements or services," before it can be determined to have made available access to "the items enumerated in the checklist (*e.g.*, unbundled loops, unbundled local switching, resale services)."¹⁰⁶

As discussed above, BellSouth has failed to demonstrate that it is providing or capable of providing nondiscriminatory access to OSS functions. Accordingly, the carrier has also failed to show that it is making available or is capable of making available nondiscriminatory access to network elements on an unbundled basis. The same OSS failing also undermines BellSouth's claims that it has satisfied the resale requirements of Section 251(c)(4). As the Commission has succinctly stated, neither a network element nor a wholesale offering is "practically available" if it cannot be ordered, maintained, repaired or invoiced in a timely and efficient manner.

¹⁰⁵ Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 132.

¹⁰⁶ Id.

**D. BellSouth Has Signaled Its Intention Not To Comply
With Sections 251(g) And 272(e)(4)**

It should not escape the Commission's attention that the careful wording of BellSouth's Brief evinces the carrier's clear intention not to restrict its activities post grant of "in-region," interLATA authority to the Commission's view of the scope and applicability of various statutory mandates. In a glaring example of such disregard, BellSouth uses its Application as a vehicle to "petition[] the Commission to reconsider the Michigan Order's discussion of Ameritech's proposed 'marketing script'". In the passage to which BellSouth objects, the Commission held that

Mentioning only Ameritech Long Distance unless the customer affirmatively requests the names of other interexchange carriers is inconsistent on its face with our requirement that a BOC must provide the names of interexchange carriers in random order. Such a practice would allow Ameritech Long Distance to gain an unfair advantage over other interexchange carriers. . . a BOC must 'provide any customer who orders new local exchange service with the names and, if requested, the telephone number of all the carriers offering interexchange services in its service area. *Moreover, we conclude[] that the 'BOC must ensure that the names of the interexchange carriers are provided in random order.'*"¹⁰⁷

By asserting, in the face of crystal clear evidence of the limitations imposed by Section 272 on joint marketing activities, specifically enacted "to effectuate the goal of preventing anticompetitive abuses by BOCs that control essential local facilities and seek to enter competitive markets that require these facilities as an input,"¹⁰⁸ that "[a]ny requirement that the BOC's long

¹⁰⁷ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 376 (citing Non-Accounting Safeguards Order, 11 FCC Rcd. at 22046).

¹⁰⁸ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 97-222, ¶ 10 (rel. June 24, 1997); *pet. for review pending sub nom. Bell Atlantic Telephone Companies v. FCC*, Case No. 97-1432 (D.C. Cir. July 11, 1997).

distance affiliate be mentioned only as part of a random list would nullify the BOC's statutory joint marketing right,"¹⁰⁹ BellSouth provides two equally crystal clear messages. The first message is that, even before it has attained Section 271 authority, BellSouth has little intention of confining itself to the parameters of acceptable joint marketing activities as set forth in Section 251 where doing so would inhibit its ability to prefer its in-region affiliate over every other long distance carrier.¹¹⁰ The second message is that BellSouth will not feel restrained by interpretations of Section 272 with which it disagrees, even if those views are espoused by the Commission.

In another passage, BellSouth again demonstrates its lack of conviction to fully embrace and comply with obligations imposed by the Act as implemented by the Commission. Indicating that "to the extent that [it] is permitted to provide interLATA or intraLATA facilities or services to [its long distance affiliate], [it] will make such services or facilities available to all carriers at the same rates and on the same terms and conditions, in accordance with section 272(e)(4),"¹¹¹ BellSouth ignores as inconvenient the Commission's holding that regardless of whether such facilities, services or information are made available to other providers of interLATA services, "[t]he leasing of capacity on an in-region interLATA network is plainly an in-region interLATA service . . . [a]nd as we conclude in this *Second Order on Reconsideration*, because section 272(e)(4)

¹⁰⁹ BellSouth Brief at 64.

¹¹⁰ Id. at 63.

¹¹¹ Id. at 62.

is not a grant of authority, a BOC may not directly provide in-region interLATA services until the separate affiliate requirement is removed."¹¹²

The Commission has stated that "evidence that a BOC applicant has violated federal telecommunications regulations or engaged in anticompetitive conduct is relevant to our inquiry under section 271, and would be considered in the public interest analysis."¹¹³ In TRA's view, multiple indications of an intention to violate regulations or otherwise engage in anticompetitive conduct *in the future*, such as those advanced by BellSouth, are likewise directly relevant to the merits of a BOC's Section 271 application and should be considered carefully by the Commission here.

**E. Grant Of The BellSouth Application Would Not Be Consistent
With The Public Interest, Convenience And Necessity**

The final evaluative task assigned to the Commission under Section 272(d)(3) is the determination of whether grant of the "in-region," interLATA authorization sought by BellSouth would be "consistent with the public interest, convenience, and necessity."¹¹⁴ The public interest standard is a necessarily broad test incorporating a host of considerations. As the Commission has recently noted, "[c]ourts have long held that the Commission has broad discretion in undertaking .

¹¹² Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 97-222 at ¶ 54.

¹¹³ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 374.

¹¹⁴ 47 U.S.C. § 271(d)(3)(C).

. . public interest analyses."¹¹⁵ Indeed, "section 271 grants the Commission broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region, interLATA market is consistent with the public interest."¹¹⁶

Obviously, a critical element of a public interest analysis involving market entry is the competitive impact of such entry.¹¹⁷ TRA agrees with the Commission that the inclusion of a public interest test among the Commission's evaluative requirements reflects a Congressional mandate that the Commission assess the impact of BOC provision of "in-region," interLATA service on both nascent local and existing long distance competition.¹¹⁸ Certainly, the public interest test is not a license for the Commission to reduce or expand the "competitive checklist;" Section 271(d)(4) makes this clear.¹¹⁹ Congress clearly intended a more "macro" analysis involving a broad assessment of competitive and consumer impacts.

It is TRA's strongly-held belief that the public interest would not be served by authorizing BellSouth to originate interLATA service within the State of South Carolina until such

¹¹⁵ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 384.

¹¹⁶ Id. at ¶ 383.

¹¹⁷ Id.; *see, e.g., FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 - 91 (1953).

¹¹⁸ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶¶ 385 - 88.

¹¹⁹ 47 U.S.C. § 271(d)(4). As the Commission recognized, a proposed amendment that would have eliminated the public interest test because it was duplicative of the "competitive checklist" was soundly defeated by the Senate. Cong. Rec. 57960 - 7971 (daily ed. June 8, 1995). Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 389.

time as consumers in at least the largest metropolitan areas within the State are able to select among two or more established facilities-based providers of local exchange/exchange access service and interstate switched access charges have been reduced to reflect the economic cost of originating and terminating long distance traffic. By established facilities-based providers, TRA is referring to competitive local exchange carriers that are, and have been for some modicum of time, operational and are providing dial tone and other local services to a significant number of customers. A critical mass of customers is an essential element because a provider's ability to attract customers is a demonstration of its and its service's operational viability, which in turn confirms the BOC's compliance with the Telecommunications Act's mandate that services and facilities provided to a new market entrant must be at least of equal quality to that the BOC provides to itself. Market share, while not a perfect indicator, is also a useful gauge of the viability of competition in a market.¹²⁰

As the Commission has recently noted:

The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban and rural) in the relevant state, and at different scales of operation (small and large).¹²¹

As monopoly or near monopoly providers of local exchange/exchange access service, the BOCs retain the ability to (i) hinder competitive entry into local markets; (ii) undermine the

¹²⁰ See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

¹²¹ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 391.

competitive viability of new entrants into the local market; and (iii) adversely impact existing providers of interLATA service. The BOCs will retain the ability to impede local, and diminish long distance, competition so long as they retain control of local "bottleneck" facilities. This ability to act anticompetitively will diminish only when competitive providers of local exchange/exchange access service who are not dependent upon BOC network services establish a solid competitive foothold, thereby eroding the local "bottleneck." Until a BOC's control of "bottleneck" facilities no longer encompasses the larger part of the population of a State, authorizing the BOC to originate interLATA service within that State would not only not serve, but would be directly contrary to, the public interest. Such a premature action would deny the residents of the State not only the potential benefits of local exchange/exchange access competition, but reduce the existing benefits to those consumers of long distance competition.

The telephony provisions of the 1996 Act are designed, among other things, to open the monopoly local exchange/exchange access markets to competitive entry, eliminating "not only statutory and regulatory impediments to competition, but economic and operational impediments as well."¹²² It belabors the obvious, however, to state that an order of magnitude difference exists between theoretically "contestable" and actually "contested" markets. While competitive potential may ultimately evolve into actual competition significant enough to discipline BOC market power, the lag in time before competition actually emerges may, and likely will, be substantial. And this lag in time will be exacerbated by BOC resistance to competitive entry and the competitive provision of local exchange and exchange access service. As succinctly put by the Commission:

¹²²

Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 3.

We recognize that the transformation from monopoly to fully competitive markets will not take place overnight. We also realize that the steps taken thus far will not result in the immediate arrival of fully-effective competition. Accordingly, the Commission and state regulators must continue to ensure against any anticompetitive abuse of residual monopoly power, and to protect consumers from the unfettered exercise of that power.¹²³

As noted previously, monopolists do not readily relinquish market power. As the Commission has recognized, "because an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market."¹²⁴ BOCs and other incumbent LECs can erect a variety of economic and operational barriers to competitive entry into, and competitive survival in, the local market. History teaches that the BOCs will actively seek as a profit maximizing strategy to forestall competition by interposing these barriers. TRA submits that BOC market conduct will be adequately disciplined only when local dial tone can be obtained from other facilities-based providers with proven competitive capabilities, and that the only incentive strong enough to motivate the BOCs to permit such facilities-based competitive entry is their desire to provide "in-region," interLATA services.

TRA believes that the experience of its resale carrier members in dealing with AT&T in the long distance market is instructive here. When non-facilities based or "switchless" resale was born in the late 1980s, AT&T possessed a market share in the range of 75 percent; MCI's market

¹²³ Ameritech Operating Companies: Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, 11 FCC Rcd. 14028, ¶ 130 (1996).

¹²⁴ Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 10.

share was roughly ten percent, with Sprint lagging behind at around six percent.¹²⁵ During the following decade, AT&T lost more than a quarter of its market share, while MCI and Sprint increased their market shares by more than fifty percent and WorldCom seized five percent of the market.¹²⁶ During this interim period, the dealings of TRA's resale carrier members with AT&T were marred by persistent and substantial anticompetitive abuses, while MCI generally declined to provide service to resale carriers.¹²⁷ Only Sprint and WilTel aggressively sought the business of

¹²⁵ Long Distance Market Shares (First Quarter 1997), Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Table 6 (Oct. 1997).

¹²⁶ Id.

¹²⁷ A survey by TRA of its resale carrier members in 1994 showed that anticompetitive abuses were limited almost exclusively to AT&T. Thus, for example, nearly 80 percent of respondents identifying AT&T as their long distance network provider reported that AT&T had used their confidential and proprietary information to solicit their customers, indicated that such abuses occurred "very frequently," "frequently" or "regularly" and were "very serious" or "serious," and confirmed that they had lost a "large number" or a "medium number" of customers as a result of such abuses. For all the rest of the long distance network providers combined, there were only two reports of "frequent" or "regular" abuse and only three reported instances of "very serious" or "serious" abuses and "large numbers" or "medium numbers" of lost customers. With respect to service provisioning, TRA's survey revealed similar discrepancies among AT&T and the other long distance network providers. Thus, survey respondents reported that, with rare exceptions, most network providers provisioned service orders within fifteen days, with the large majority of orders being processed within ten days. In contrast, the vast majority of respondents who used AT&T reported provisioning intervals for outbound service of between sixteen days and more than one hundred and twenty days, with delays generally in the sixteen to sixty day range. With respect to "800" service, more than two thirds of the AT&T respondents reported delays of twenty-six days or more, ranging upward to one hundred and twenty days. Likewise, the survey revealed that AT&T rejected upwards to six times the number of service orders rejected by other long distance network providers. As a result, a majority of the survey respondents identifying AT&T as their network provider characterized "jamming" as a "very serious" or "serious" problem, while among respondents who identified other carriers as their network providers only a small handful so characterized "jamming." Yet another example of anticompetitive abuse relates to incomplete, inaccurate or untimely call detail reporting. Of the survey respondents identifying AT&T as their network provider, more than two thirds reported that "unbilled toll" remained a problem, while less than twenty percent of all

resale carriers and structured their operating systems to accommodate resale. It has only been of late that AT&T has begun to view resale carriers as the large, desirable customers the FCC perceived them to be in 1991.¹²⁸

As the dominant player in the long distance market, AT&T had the ability and the incentive to act in an anticompetitive manner toward resale carriers. After all, seven out of every ten customers acquired by resale carriers were previously AT&T customers. In sharp contrast, Sprint and WilTel had a strong economic incentive to deal with resale carriers. More than nine out of every ten customers resale carriers placed on the Sprint network had been customers of Sprint's long distance competitors and WilTel had positioned itself in the market as a wholesale provider. As a result, Sprint and WilTel welcomed resale carriers and actively worked to enhance service provisioning, billing and security to benefit resale carriers, while AT&T abused its forced relationship with resale carriers, acting to affirmatively undermine their competitive viability. Only

[footnote continued from preceding page]

other respondents so indicated. Not surprisingly, the vast majority of survey respondents that utilized AT&T as their network provider described their relationship with AT&T as "poor" or "fair," while the overwhelming majority of respondents who used the networks of Sprint or WilTel rated their relationships with these carriers as "good," "very good" or "excellent," with the greatest number rating their relationships "very good."

¹²⁸ Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd. 5880, ¶ 115 (1991) ("First Interexchange Competition Order"), 6 FCC Rcd. 7255 (1991), 6 FCC Rcd. 7569 (1991), 7 FCC Rcd. 2677 (1992), *recon.* 8 FCC Rcd. 2659 (1993), 8 FCC Rcd. 3668 (1993), 8 FCC Rcd. 5046 (1993), *recon.* 10 FCC Rcd 4562 (1995) ("[R]esellers, like other users, are valued customers -- in fact, they are large customers. It is not reasonable to assume that AT&T will refuse to present them with viable service options at reasonable rates."). The Commission was correct in one respect, resale carriers are among the largest purchasers of interexchange services in the Nation. For example, the resale carriers listed in the FCC's report of long distance market share provide billions of dollars in revenues annually to long distance network service providers. Long Distance Market Shares (First Quarter 1997) at Table 6.

when AT&T's market share approached 50 percent and the other facilities-based providers had achieved a strong market position did AT&T begin to reform its conduct with respect to resale carriers. Other earlier offered incentives, such as price cap regulation or reclassification as a nondominant carrier, had proven to be insufficient to incent such reformation.

History will soon repeat itself in the local market. Like AT&T, the BOCs will seek to thwart competition by anticompetitive abuse of market power; their ability and incentives to do so, however, will be greater than AT&T's both because their market share is substantially larger and their control of essential facilities is far more pervasive. While the Commission has recognized that the "transition from monopoly to competition" will not be an easy one and has promised "swift, sure and effective" enforcement of the rules adopted to open local markets to competition, it has nonetheless acknowledged that in the event that it fails in its enforcement responsibilities, "the actions [taken] . . . to accomplish the 1996 Act's pro-competitive, deregulatory objectives may prove to be ineffective."¹²⁹

TRA submits that only an entity which has operated within a legally protected monopoly environment, confronting competition only at the fringes of its market, would claim with a straight face that the public interest would be well served by sanctioning its entry into a competitive market in which it could use its market power in its monopoly stronghold to disadvantage competitors without first ensuring that that monopoly bastion had been, or at least could be, breached by competitive providers. The market BellSouth seeks to enter is now served by a half dozen national networks supplemented by dozens of regional networks, and populated by

hundreds of providers.¹³⁰ More than five years ago, the Commission found this market to be "substantially competitive."¹³¹ And since that time, the market share of AT&T has fallen another ten percentage points and the market share of carriers beyond the "big three" has nearly doubled.¹³²

Standing in stark contrast is the local exchange/exchange access market. The BOCs still account for "approximately 99.1 percent of the local service revenues in the markets they serve."¹³³ Two years ago, the Commission reported that "development of competition in local services is roughly a dozen years behind the development of competition in long distance."¹³⁴ Over the past decade, competitive access providers have only "selectively impact[ed] the growth of demand of the local exchange carriers."¹³⁵ In short, the local exchange remains "one of the last monopoly bottleneck strongholds in telecommunications."¹³⁶

As the Commission has recognized, introducing competition into the local exchange/exchange access market is key to realization of the Congressional goal of "opening all

¹³⁰ Motion of AT&T to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, ¶¶ 57 - 62 (1995); Fiber Deployment Update: End of Year 1996, Kraushaar, J. M., Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, 6 - 14 (July 1997).

¹³¹ Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd. 5880 at ¶ 36.

¹³² Long Distance Market Shares (First Quarter 1997), Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Table 5 (Jan. 15, 1997).

¹³³ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd. 21905 at ¶ 10.

¹³⁴ Common Carrier Bureau, Federal Communications Commission, Common Carrier Competition, (Spring, 1995).

¹³⁵ Fiber Deployment Update: End of Year 1996 at 34.

¹³⁶ Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 4.

telecommunications markets to competition."¹³⁷ Infusion of competition into this "monopoly bottleneck stronghold" was intended by Congress "to pave the way for enhanced competition in *all* telecommunications markets."¹³⁸ As the Commission explained, "[c]ompetition in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of *local* services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition."¹³⁹

The sequence, hence, is critical to furtherance of the public interest. First, given that "incumbent LECs have no economic incentive, *independent of the incentives set forth in sections 271 and 274 of the 1996 Act*, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services,"¹⁴⁰ local exchange/exchange access competition will not emerge, or will not emerge as quickly, if BOC entry into the "in-region," interLATA market is authorized prematurely. Thus, in order to secure for the public the benefits of local competition, grant of "in-region," interLATA authority must follow competitive entry into the local exchange/exchange access market. Only after the benefits to be derived from such competitive entry have been secured should the focus shift to "promoting greater competition in the long distance market."¹⁴¹ As the Commission has explained, local exchange/exchange access competition will

¹³⁷ Joint Explanatory Statement at 113.

¹³⁸ Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 4 (emphasis in original).

¹³⁹ Id. (emphasis in original).

¹⁴⁰ Id. at ¶ 55 (emphasis added).

¹⁴¹ Id. (emphasis in original).

"pave the way for enhanced competition in all telecommunications markets."¹⁴² As set forth by the Commission, the proper sequence is:

Under section 251, incumbent local exchange carriers . . . , including the Bell Operating Companies . . . , are mandated to take several steps to open their networks to competition . . . Under Section 271, *once the BOCs have taken the necessary steps*, they are allowed to offer long distance service in areas where they provide local telephone service.¹⁴³

Moreover, just as the Commission has recognized that the public will benefit from local exchange/exchange access competition, so too has it acknowledged that the BOCs retain the incentive and the ability to utilize their "bottlenecks" control of essential facilities to disadvantage IXC rivals.¹⁴⁴ While the Congress and the Commission have endeavored to establish various structural and accounting safeguards to curb BOC abuse of market power, only the market forces unleashed by competitive entry into the local exchange/exchange access market will adequately discipline BOC market behavior.¹⁴⁵ Thus, the secondary goal of "promoting greater competition in the long distance market" will only be achieved if the proper sequence is followed.

The existence of widespread local exchange/exchange access competition addresses several concerns critical to a public interest analysis. First, it provides demonstrable evidence that

¹⁴² Id. (emphasis in original).

¹⁴³ Id. (emphasis in original).

¹⁴⁴ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd. 21905 at ¶¶ 10 - 13.

¹⁴⁵ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd. 21905 at ¶¶ 1 *et. seq.*; Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996 (Report and Order) 11 FCC Rcd. 17539 (1996); 47 U.S.C. § 272.